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No. _____

In The

Supreme Court of the United States

RUSSELL BRIDENBAUGH,

Petitioner,

v.

FRANK O'BANNON, in his official capacity as Governor of the State of Indiana,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does IND. CODE 1-1-9-1 violate the Establishment Clause of the First Amendment to the United States Constitution insofar as it makes Good Friday a state holiday, despite the fact that Good Friday is an unambiguously religious holiday which has not been secularized in the State of Indiana.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were petitioner Russell Bridenbaugh and respondent Frank O'Bannon who has been sued in his official capacity as Governor of the State of Indiana.

The parties on appeal are identical.

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The opinion of the United States Court of Appeals for the Seventh Circuit, dated July 21, 1999, is reported at 185 F.3d 796 (7th Cir. 1999), and is reprinted in the Appendix at pages 1a through 20a. A timely petition for rehearing, with suggestion for rehearing en banc, was filed and was denied on August 19, 1999. The denial is reprinted in the Appendix at page 32a. The parties consented to have the case heard by a magistrate judge, who granted summary judgment for respondent on July 13, 1998. The decision of the trial court is not reported. The trial court's Entry is reprinted at Appendix 21a through 31a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit is dated July 21, 1999. The Seventh Circuit's Order denying the petition for rehearing and suggestion for rehearing en banc is dated August 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

IND. CODE § 1-1-9-1 states that:

(a) The following are legal holidays within the state of Indiana for all purposes:

* * *

Good Friday, a movable feast day.

* * *

STATEMENT OF THE CASE

A. Basis of Federal Jurisdiction in the District Court

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 because of the presentation of a federal question.

B. Statement of the Facts

Good Friday is the Friday before Easter and is the Christian holiday which commemorates the death of Jesus Christ, believed by Christians to be the Messiah. (22a). It is one of the holiest days in the Christian calendar and is viewed by many Christians as a very solemn holiday. (23a). Since 1941, Indiana law has provided for a state holiday on Good Friday. (21a).

Indiana law provides that legal holidays are paid holidays for employees of the State. (IND. CODE 1-1-9-2). Therefore, most Indiana offices are closed on legal holidays and employees are paid for their day off. (22a). Certain Indiana offices, such as prisons, State police offices, and State hospitals remain open, even on legal

holidays. (*Id.*). These offices which remain open even on legal holidays will go on minimal staffing. (*Id.*). Employees who work on state holidays will receive either additional compensation or they will be given compensatory time so that they may take a different day off, with pay. (*Id.*).

Including Good Friday, there are 14 state holidays in election years since both Election Day and primary day are holidays. (IND. CODE § 1-1-9-1). In non-election years there are 12 holidays. In election years, Indiana ranks in the top 3% of employers nationwide in the number of holidays provided. (24a). Indiana believes that a generous number of holidays bolsters employee efficiency. (25a). Although there is no legislative history indicating why Good Friday was made a legal holiday, Indiana's stated secular purpose of the holiday is to provide a spring holiday for employees of the State. (23a, 24a).

Indiana law provides that the date of celebration of all legal holidays, with the exception of Dr. Martin Luther King's birthday, may be shifted to other dates by the Governor. (22a). However, Good Friday is never shifted and is always celebrated by the State on the date that it falls on the calendar each year. (Supplemental Joint Statement of Undisputed Facts).

Non-Christian State employees who wish to take a day off on one of their religious holidays must request the day off of work and then, if the request is granted, must use either their vacation time, compensatory time, or a personal day. (23a). If the employees do not have either vacation, compensatory, or personal time accumulated, they must request to take a day off without pay if

they wish to celebrate their holiday. (*Id.*). Although the State attempts to accommodate the requests of these non-Christian employees to take time off to celebrate their religious holidays, there are times when the State determines that it would be an undue hardship on the State to allow the person to have the day off and the person will therefore not be permitted to take the day off. (*Id.*).

Aside from the closing of State offices to allow employees of the State of Indiana to take Good Friday off as a holiday, the State of Indiana is not aware of any other way that Good Friday has become secularized in Indiana. (26a). The undisputed testimony was that unlike Christmas, which has lost some of its religious significance, Good Friday has not lost any of its religious significance. (Affidavit of Edgar Towne).

The Indianapolis Star newspaper noted that federal offices, most schools, stores and banks were all open on Good Friday in the Indianapolis area. (24a). During the 1996-97 school year 204 of Indiana's 293 public school districts were open on Good Friday. (26a). A survey of a nine state region, which includes Indiana, discloses that 44% of employers allow their non-exempt employees to take Good Friday off. (24a, 26a). There is not specific information as to Indiana.

Russell Bridenbaugh is an employed adult resident of Bloomington, Indiana. (26a). He is an Indiana taxpayer who believes that the Good Friday holiday is unconstitutional since it establishes a religious holiday as a state holiday and favors one religion over others and over non-religion. (*Id.*).

C. Proceedings Below

The case was submitted to the district court on cross motions for summary judgment. The petitioner argued that since Good Friday had not become secularized in any way in Indiana, the State had to demonstrate a secular justification for selecting that day as its claimed spring holiday. The petitioner argued that, absent this showing, the holiday represented an endorsement of religious belief and had as its primary effect the advancement of religion. In granting summary judgment for the State of Indiana the trial court recognized that the holiday made it easier for Christian state employees to celebrate their religious holiday. However, the court found that the State's articulated desire of providing a spring holiday established a sufficient secular justification to allow Good Friday to be made a spring holiday. In affirming the district court the Seventh Circuit found that Indiana had tied the Good Friday holiday to Easter which the court found had become secularized. The panel also concluded that the desire to have a spring holiday was sufficient to justify the placement of the holiday on Good Friday. Based on these findings, the Seventh Circuit held that the Good Friday holiday was neither an endorsement of religion nor did it have the primary effect of advancing religion.

ARGUMENT

Reasons for Granting the Petition

Plenary review in this case is appropriate because the question of under what circumstances a governmental

entity can proclaim a Good Friday holiday is an important and recurring question of law that has created both conflict and confusion in the lower courts. Additionally, plenary review is appropriate in order to ensure adherence to the core principles of Establishment Clause law articulated by this Court.

I. The writ should be granted because the question presented of whether a state may celebrate Good Friday as an official holiday is one of national significance that has caused conflict and confusion among the lower courts

The question of under what circumstances a state or governmental entity can make Good Friday a holiday is one which has been frequently litigated in the courts of the United States. A number of decisions have found the Good Friday holiday or public closing to be constitutional. *See Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding Maryland statute providing for a public school holiday on Good Friday and the Monday after Easter); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (upholding practice of a county court of closing on Good Friday); *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *reh'g en banc denied*, 944 F.2d 466 (9th Cir. 1991), *cert. den.*, 505 U.S. 1219 (1992) (upholding statute making Good Friday a state holiday in Hawaii); *Franks v. Niles*, 29 Fair Emp. Prac. Cases (BNA) 1114 (N.D. Ohio 1982) (upholding a Good Friday holiday for public employees as the result of a collective bargaining agreement); *Americans United for Separation of Church and State v. Kent County*, 293 N.W.2d 723 (Mich.App. 1980) (upholding a Good Friday holiday for public employees as the result of a collective

bargaining agreement); *California School Employees Ass'n v. Sequoia Union High School District*, 67 Cal. App. 3d 157, 136 Cal.Rptr. 594 (Cal. Dist. Ct. App. 1977) (upholding a Good Friday holiday for public employees as the result of a collective bargaining agreement).

Conversely, a number of courts, including an earlier panel from the Seventh Circuit, have found a Good Friday holiday or closing to be unconstitutional. *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995) (striking down an Illinois statute which mandated school closings on Good Friday); *Freedom From Religion Foundation v. Thompson*, 920 F.Supp. 969 (W.D. Wis. 1996) (striking down a statute making Good Friday afternoon a legal holiday); *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16 (Conn. 1981) (Striking down a Connecticut statute which prohibited the sale of alcohol on Good Friday); *Mandel v. Hodges*, 54 Cal.App.3d 596, 127 Cal.Rptr. 244 (Cal.App. 1976) (declaring unconstitutional a gubernatorial order which closed state offices for a three hour period on Good Friday).

Furthermore, at least fourteen states have statutes proclaiming all, or part, of Good Friday to be a legal holiday.[1] And, there are undoubtedly local jurisdictions,

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[1] The following state statutes make all or part of Good Friday a state holiday.

-CAL. GOV'T CODE § 6700 (1995) (Making Good Friday from 12 noon until 3 p.m. a state holiday) (declared unconstitutional in *Mandel v. Hodges*, 127 Cal.Rptr. 244, 54 Cal.App. 3d 596 (Cal.App. 1976)

-DEL. CODE ANN. tit. I § 501 (1993) (Making Good Friday a legal holiday)

like the county court in *Granzeier v. Middleton, supra,* which feature Good Friday closings. Given the frequency with which the issue of the constitutionality of a Good Friday holiday has arisen, and given the continuing potential for the question to be raised, the writ should be granted at this time to resolve a question of national significance and to clearly delineate the circumstances under which a Good Friday holiday can be constitutionally created.

-FLA. STAT. ANN. ch. 683.01 (1999 Supp.) (Making Good Friday a legal holiday)

-HAW REV. STAT. § 8-1 (1993) (Making Good Friday a state holiday)

-205 ILL. COMP. STAT. 630/17 (1999 Supp.) (Making Good Friday a legal holiday)

-KY. REV. STAT. ANN. § 18A.190 (1999 Supp.) (Closing state offices for one-half day on Good Friday)

-LA. REV. STAT. ANN. § 1:55 (West 1999) (Making Good Friday a legal holiday)

-MD. CODE ANN. Art. 1 § 27 (1998) (Making Good Friday a legal holiday)

-N.J. STAT. ANN. § 36:1-1 (1999 Supp.) (Making Good Friday a public holiday)

-N.C. GEN. STAT. § 103-4(a) (1995) (Making Good Friday a legal public holiday)

-N.D. CENT. CODE § 1-03-01 (1999 Supp.) (Making Good Friday a state holiday)

-PA. STAT. ANN. tit. 44, § 11 (West 1991) (Making Good Friday a bank holiday and public holiday)

-TENN. CODE ANN. § 15-1-101 (1999) (Making Good Friday a legal holiday)

-WIS. STAT. ANN. § 895.20 (1997) (Making Good Friday a legal holiday from 11:00 a.m. to 3:00 p.m. (struck down as unconstitutional in *Freedom from Religion Foundation v. Thompson,* 920 F.Supp. 969 (W.D.Wis. 1996)

II. Certiorari should be granted to prevent doctrinal confusion and departure from this Court's Establishment Clause jurisprudence

The panel's decision, and the recent cases upholding Good Friday closings, are marked by doctrinal confusion and a drift away from the central themes of this Court's Establishment Clause jurisprudence. Whether the test for an Establishment Clause violation is articulated under the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) [its principal effect neither inhibits nor advances religion], or under an endorsement analysis, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the focus of the inquiry must be on whether the government is "convey[ing] a message that religion or a particular belief is favored or preferred." *County of Allegheny*, 492 U.S. at 593, *quoting Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief. . . . " *County of Allegheny*, 492 U.S. at 594.

Prior to the panel's decision, the Seventh Circuit had appeared to recognize this in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), where the court struck down an Illinois statute which provided for school closings on Good Friday. In doing so, the court recognized that, since Good Friday was a purely religious holiday, the State of Illinois had to carry the burden of demonstrating a secular justification for the holiday. 57 F.3d at 620-21, 622. And, inasmuch as Good Friday was an unambiguously religious holiday, there had to be some "inevitability" or necessity for the State's choice of Good Friday, as

opposed to another date. 57 F.3d at 623.[2] As Judge Posner observed in *Metzl*, without a significant and non-pretextual secular justification to select Good Friday as an official public holiday, all that is left is an endorsement or an advancement of religion.

The panel's decision in this case rejected Judge Posner's analysis and proceeded on a very different set of legal assumptions which cannot be reconciled with this Court's Establishment Clause jurisprudence. The court below erroneously found that Good Friday had been secularized by its linkage with Easter despite the uncontroverted evidence that Good Friday is a purely religious holiday. (12a). It also found that Indiana's claim, raised for the first time during this litigation, that it desired to have a spring holiday at some point was sufficient to justify the selection of Good Friday as the date for the holiday. (8a-9a). In contrast to Judge Posner's decision in

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[2] In contrasting the Illinois situation with the Sunday closing law upheld in *McGowan v. Maryland*, 366 U.S. 420 (1961), the *Metzl* court stated that in *McGowan*:

> The inevitability of selecting Sunday as the day for requiring stores to be closed was so plain that no evidence for the proposition was required . . . No such inevitability attends the closing of public schools on Good Friday. For all we know, in many school districts in Illinois the public schools could be kept open on Good Friday with very little absenteeism and certainly without exerting the sort of competitive pressures that might in an earlier era have forced all retail stores to remain open on Sunday if some did.

57 F.3d at 623.

Metzl, the court below reached this conclusion without requiring Indiana to demonstrate any secular reason why it selected Good Friday over available dates. In particular, there is absolutely no evidence in the record that Indiana's choice of Good Friday as an official holiday was prompted by such legitimate secular concerns as excessive absenteeism. Indeed, the only evidence in the record specific to Indiana points in the other direction. As the record shows, the large majority of schools in Indiana, as well as most stores and banks in the Indianapolis area, remain open on Good Friday. Indiana never explained why it chose to set Good Friday as a state holiday when it is not recognized as such by the remainder of the state. And, the court below never explained why, in the absence of such evidence, a reasonable observer would not perceive the state's selection of Good Friday for special treatment as not just an endorsement of religion, but as an endorsement of a particular religious faith.

The panel's decision in this case therefore does violence to the notion that the Establishment Clause is violated if a governmental practice has "the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). "[T]he First Amendment does not allow a state to make it easier for adherents of another faith to practice *their* religion, unless there is a secular justification for the difference in treatment." *Metzl*, 57 F.3d at 621 (Court's emphasis). It is important to rectify the panel's erroneous decision for a number of reasons. First, it is important to settle the law in the specific area of Good Friday since, as indicated

above, this is a question which affects many states. Secondly, it is important to review and reverse the panel's erroneous decision, not just to resolve cases which concern Good Friday, but to assure uniform interpretation of the Establishment Clause whenever a governmental entity links itself in some way with religion or religious practices.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
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No. 98-3058

RUSSELL BRIDENBAUGH,

Plaintiff-Appellant,

v.

FRANK O'BANNON, in his official capacity as Governor of the State of Indiana,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division,
No. 97 C 1132 – **V. Sue Shields,** *Magistrate Judge.*

ARGUED JANUARY 11, 1999 – DECIDED JULY 21, 1999

Before FAIRCHILD, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* By statute, Indiana state employees have a day off with pay on Good Friday, as they do on at least eleven other legal holidays during the year. Russell Bridenbaugh sued Frank O'Bannon, Indiana's Governor, in his official capacity, contending that providing Good Friday as a legal holiday was a "law respecting an establishment of religion" and so violated the First Amendment. The parties consented to have the

case heard by a magistrate judge, who granted the defendant summary judgment. Bridenbaugh appeals. We affirm.

BACKGROUND

Indiana ranks as one of the most generous states in terms of the number of legal holidays it gives to its employees – fourteen in election years and twelve in non-election years. On legal holidays in Indiana, state employees have the day off with pay, and most Indiana state offices are closed. Those which remain open, such as prisons, police stations and hospitals, use minimal staffing. Legal holidays recognized in Indiana are: New Year's Day; Martin Luther King, Jr.'s birthday, commemorated on the third Monday in January; Abraham Lincoln's birthday, February 12; George Washington's birthday, which is observed on the third Monday in February; Good Friday, which is the Friday preceding Easter Sunday; Memorial Day; Independence Day; Labor Day; Columbus Day, observed on the second Monday in October; Primary Election Day; Election Day; Thanksgiving Day; and Christmas Day. Ind.Code 1-1-9-1. The statute which establishes these legal holidays also authorizes the Governor to shift the date on which the holiday is observed, although the Governor cannot move the day of observance for Martin Luther King, Jr.'s birthday. Ind.Code 1-1-9-2. Thus, even though both Lincoln's birthday and Washington's birthday fall in February, in order to give employees a longer consecutive holiday, the Governor generally moves these holidays to the day after Thanksgiving and to either the day before or after Christmas. Because Lincoln's and Washington's birthdays are not

observed in February, absent the Good Friday holiday employees would be without a holiday for more than four months (between Martin Luther King, Jr.'s birthday and Memorial Day).

Good Friday has been a legal holiday in Indiana since 1941. On Good Friday, Christians commemorate the death of Jesus Christ, whom they believe to be the Messiah. The date on which Good Friday is observed changes from year to year because it always falls on the Friday before Easter, and Easter falls on different dates in different years.[1] See Ind.Code, 1-1-9-1 (enumerating legal holidays in Indiana, including "Good Friday, a movable feast day").

Russell Bridenbaugh believes that by giving employees a legal holiday on Good Friday, Indiana is violating the Establishment Clause of the United States Constitution. He sued the Governor of Indiana, Frank O'Bannon, in his official capacity, seeking declaratory and injunctive relief. (For simplicity, we will refer to the defendant as "Indiana.") The parties filed cross-motions for summary judgment. The magistrate judge granted Indiana summary judgment, concluding that Section

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[1] Easter is celebrated on the first Sunday after the first full moon following the vernal equinox. However, because the Eastern and Western Christian Churches use different calendars – Western Churches use the Gregorian calendar, while Eastern Churches use the Julian calendar – and because in the Eastern Church Easter must follow the Jewish Passover, Christians around the world sometimes celebrate Easter on different dates. Indiana apparently ties the Good Friday holiday to the date of Easter celebrated by Christians descended from the Western Church.

1-1-9-1 of the Indiana Code does not violate the Establishment Clause because Indiana has presented evidence of a secular justification for the holiday.

ANALYSIS

The First Amendment, which applies to the states via the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . . . " The Supreme Court has frequently wrestled with how to apply the Establishment Clause, most significantly in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Court adopted a three-prong test for determining the constitutionality of governmental action. A law does not run afoul of the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

While some have questioned the continued validity of the *Lemon* test – preferring the so-called endorsement test articulated in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 699 (1984), *see also Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 763 (1995); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989) – the Supreme Court recently reaffirmed that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed. . . . " *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997). Thus, the Court "continue [s] to ask whether the government acted with the purpose of

advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. Likewise, [the Court] continue[s] to explore whether the aid has the 'effect' of advancing or inhibiting religion. . . . " *Id.* at 222-23. And finally, the Court still considers whether the governmental action resulted in an excessive entanglement between church and state. *Id.* at 232. In applying our Establishment Clause analysis, we must recognize that the Clause is not absolute; it does not prohibit all interaction between government and religion. As the Court stated, "[i]n every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Lynch v. Donnelly,* 465 U.S. 668, 672 (1984).

In this case, Bridenbaugh contends that Indiana's Good Friday holiday fails the first and second prongs of the *Lemon* test; he asserts that the Good Friday holiday lacks a secular justification, and that it has the principal or primary effect of advancing religion. (Bridenbaugh does not claim that the holiday creates an excessive entanglement between church and state.)

The district court rejected these arguments. It concluded that while the Good Friday holiday has "the potential effect of making it easier for religious Christian state employees to practice their religion," Indiana had established a valid secular justification for the Good Friday holiday – to provide a long spring weekend for its employees. Accordingly, the district court upheld the

constitutionality of the Good Friday holiday and granted Indiana summary judgment.

In reaching this conclusion, the district court relied heavily on our decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). In *Metzl*, the plaintiff sued Illinois alleging that Illinois violated the Establishment Clause when it made Good Friday a legal holiday in the public school system. Illinois argued that the holiday was justified for secular reasons because it would "save the school system the expense of keeping the schools open on a day when very few teachers and students can be expected to attend." *Id.* at 621. Metzl recognized that "a law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect in promoting religion is too attenuated to worry about." *Id.* at 620. However, *Metzl* held that where the government asserted a secular justification for a law, it bore the burden of producing evidence to support that justification, and that Illinois had failed its burden because it had not presented evidence of "how many students and teachers, in each of the state's public school districts, would absent themselves from Good Friday if the challenged state law did not require the schools to be closed that day." *Id.* at 621. While *Metzl* concluded that Illinois had failed its burden, it also recognized that we would have a different case if "Illinois had made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ. . . . " *Id.* at 623. Although this comment can be labeled dictum in *Metzl* because Illinois had offered a

substantially different justification, providing a spring holiday was the precise purpose in the other two appellate decisions addressing an Establishment Clause challenge to a Good Friday closing. These courts upheld the closing based on that secular purpose. *See Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (closing Hawaii public schools); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (closing Kentucky county courts). In this case, like Hawaii and Kentucky but unlike Illinois, Indiana also justifies its Good Friday closing as accomplishing the secular purpose of providing a spring holiday.

While there is no legislative history explaining the original reason for the Good Friday holiday – which would not be dispositive anyway, *Metzl*, 57 F.3d at 621 – Indiana has officially stated that it continues to recognize Good Friday as a legal holiday in order to provide a spring holiday to state employees during a time period in which there would be over four months without a holiday (between Martin Luther King, Jr.'s birthday, observed January 20, 1997, and Memorial Day, observed May 26, 1997).[2] Indiana also presented evidence that it believes that it serves its interests as an employer to give generous holidays – including the Good Friday holiday – because holidays bolster employees' efficiency and morale. Additionally, Indiana submitted evidence that Good Friday is a good Friday for a long weekend, not only because it falls during a vacation-vacant period, but also because over thirty percent of the schools in Indiana are closed on

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[2] The Governor designated Keith Beesley, an attorney for the State Personnel Department, as the State's agent authorized to speak on its behalf in this litigation.

Good Friday, and because forty-four percent of employers in a nine-state region, including Indiana, allow their employees to take Good Friday as a holiday.[3] Thus, as the district court explained, "it is logical for the State to choose that day as its spring holiday, as an accommodation to those state employees whose children are out of school and/or spouses are off work." Therefore, unlike *Metzl*, here Indiana has provided evidence of several secular justifications for the Good Friday holiday and has thus satisfied the first prong of *Lemon*.

The plaintiff does not challenge Indiana's desire to give employees a spring holiday, but argues that the State failed to prove a secular reason for choosing Good Friday – as opposed to any other Friday – as the day for that holiday. Citing Indiana's own statistics and a newspaper article that reports that most business are open on Good Friday, Bridenbaugh asserts that because a majority of schools and businesses are open on Good Friday, Indiana could have chosen a better day for a spring holiday – although he does not tell us what that day would be. Although the record shows that nearly seventy percent of public schools and more than half of all businesses are open, the record does not show that a higher percentage of schools and businesses give a spring holiday on any other Friday or Monday in the spring. On this record, then, no other day would be a more reasonable choice to make a long weekend for a spring holiday. *See Metzl*, 57

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[3] While statistics for Indiana alone (assuming they existed) may have been more persuasive, the statistics offered support Indiana's position, especially when one considers that families often travel interstate on holiday weekends.

F.3d at 623 ("Even if more than a handful would show up – even if most would show up – if fewer would show up than on any other Friday or Monday in the spring, it would be the natural choice for elongating a spring weekend.").[4]

But Bridenbaugh essentially argues that Indiana could never create a sufficient record to support its secular purpose. He reasons that because Good Friday is a religious holiday – unlike Thanksgiving and Christmas, which he characterizes as "secularized" – a state could only have the purpose of advancing religion when it gives its employees this day off. This argument misconstrues the law. Indeed, under his reasoning Sunday closing laws would be illegal because the day of rest chosen by the state coincides with most Christians' day of rest. But we know that that is not the case. *McGowan v. Maryland*, 366 U.S. 420, 452 (1961). In *McGowan*, the Court recognized the state's secular purpose in requiring one day of general rest. *Id.* at 436 (" 'Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious

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[4] The dissent misapprehends Indiana's factual burden here, concluding that Indiana had not "fulfilled [its] burden of proof that if there was no Good Friday holiday, demands by employees for leave on that day would create a significant problem for state government." *Post* at 15 (citing *Metzl*, 57 F.3d at 622). Indiana need not show that here because, unlike Illinois, Indiana has not justified its Good Friday closing as a response to higher absenteeism. Like Hawaii in *Cammack* and Kentucky in *Granzeier*, Indiana's secular justification is to provide a spring holiday. Thus, its burden is merely to show that it had a secular justification for choosing Good Friday for that holiday. It has met that burden.

observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor.' ") (quoting *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885)). Moreover the Court recognized the secular benefit from a uniform day of rest rather than, as the petitioners suggested, merely requiring that all persons individually pick some day on which to rest. Similarly, as an employer, Indiana has an important interest in setting aside one day as a uniform spring holiday for all employees rather than merely giving them the choice of picking whichever day they individually wanted to take off – this permits Indiana to close down all non-essential services on one day rather than trying to cover for vacationing employees. And similarly to Bridenbaugh here, the petitioners in *McGowan* argued that even if the state had a secular interest in making some day the day of rest, they could not chose Sunday because that day has religious significance. The Court rejected that argument. "[T]he fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Id.* at 445; *see also id.* at 442 (Establishment Clause not offended when state law's reason or effect coincides with religious ones).

Moreover, Bridenbaugh misconstrues the Supreme Court's decisions approving government involvement in Christmas and Thanksgiving. The Court has never said these holidays have become wholly secular; indeed it has said the opposite: "[Thanksgiving] has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Lynch*, 465 U.S. at 675 (footnote omitted). In *Lynch* the Court upheld a city

actually celebrating Christmas by erecting a display that included a creche. Like Bridenbaugh here, the respondents asserted that because the creche was religious in nature, necessarily there could be no secular purpose in adding it to the Christmas display. The Court rejected this reasoning. It concluded that celebrating the holiday season and depicting its historical origins in the display were legitimate secular purposes. *Id.* at 681. And the Court noted that a secular purpose need not be the exclusive one; it was sufficient if the government had *"a* secular purpose." *Id.* at 681 n.6 (emphasis supplied). Similarly, in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), the Court held that the government could actually celebrate Chanukah and Christmas with holiday displays, but such displays could not include a display that, unlike the one in *Lynch,* conveyed nothing but a religious message. *Id.* at 600-02. The Court stated: *"Lynch* teaches that government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine." *Id.* at 601. The reasoning of those cases applies with added force in this case because, as we note below, Indiana does not celebrate Good Friday at all; it merely gives its employees a paid holiday. Under the Court's precedent Bridenbaugh's argument fails: the religious nature of Good Friday, without more, does not compel the conclusion that Indiana lacks a secular motive. If that were true, *Lynch* and *Allegheny* would have been decided differently.

Of course, Indiana could not prevail if its secular justification was merely a sham. *See Edwards v. Aguillard,* 482 U.S. 578, 586-87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it

is required that the statement of such purpose be sincere and not a sham."). But nothing indicates that Indiana's stated secular purpose is a sham, and in fact its rationale for the Good Friday holiday is consistent with its demonstrated practice of giving its employees long weekends around traditionally celebrated holidays. For instance, instead of celebrating Lincoln and Washington's birthdays in February, Indiana has moved the legal holidays to the Friday after Thanksgiving, and the day before or after Christmas. Similarly, by giving its employees the day off on the Friday before Easter, employees benefit by having a three-day weekend during a time which typically involves travel, shopping, cooking, and family gatherings. While there may be few secular aspects surrounding Good Friday, there are many secular aspects to Easter – the Easter bunny, Easter baskets, jelly beans, dyed eggs, and Easter-egg hunts. *Metzl*, 57 F.3d at 620. And Indiana has intrinsically tied the Good Friday holiday to the now-secularized Easter holiday by making it a "movable feast day."[5] Just as Indiana is justified in giving its employees extended holidays around Thanksgiving and Christmas, so too is it justified in giving employees a long Easter weekend.

Bridenbaugh also asserts that the Good Friday holiday violates the second prong of *Lemon;* Bridenbaugh

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[5] It is a bit of a mystery (and will remain so) why in 1941 the Indiana legislature labeled Good Friday as a movable "feast." In Christian terms, at least, that would certainly be a misnomer. The obvious movable feast, to which Good Friday is inextricably tied, is Easter, now largely secularized.

argues that the holiday has the principal effect of advancing religion and represents an endorsement of religion because there is no secular justification for the Good Friday holiday. This argument dovetails with his first, and, as discussed above, fails because the State has established several legitimate secular justifications for the Good Friday holiday, and has presented evidence supporting those justifications.

That leaves Bridenbaugh arguing that the Good Friday holiday advances religion because it makes it easier for Christians to practice their faith by having the day off on a day which (to them) is a religious holiday. It is true that by giving a holiday on Good Friday, it is easier for those who wish to attend religious services to do so. But that is potentially true of every legal holiday. For instance, by giving workers a holiday on Thanksgiving and Christmas, employees may more easily participate in religious services. As the Supreme Court explained in *McGowan* in upholding the constitutionality of Sunday closing laws, "it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan*, 366 U.S. at 442. Similarly, the Establishment Clause does not prohibit Indiana from choosing Good Friday as the day for a legal holiday merely because that day coincides with what, to some, is a religious day. No court has ever held that the Establishment Clause is violated merely because a state holiday has the indirect effect of making it is easier for people to practice their faith. Rather, the Supreme Court has made clear that "not

every law that confers an 'indirect, remote, or incidental' benefit upon religion is, for that reason alone, constitutionally invalid." *Lynch*, 465 U.S. at 683. Thus, in *Lynch*, the Supreme Court concluded that a city's ownership and display of a creche is constitutional because "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental;. . . . " *Id.* Likewise, any benefit to religion flowing from the Good Friday holiday is indirect, remote and incidental to the primary secular purposes for the holiday.

Moreover, Indiana does not celebrate the religious aspects of Good Friday; for Indiana, the holiday has absolutely no religious significance. To Indiana, Good Friday is nothing but a Friday falling in the middle of the long vacationless spring – a day which employees should take off to rejuvenate themselves. This contrasts sharply with other legal holidays such as Martin Luther King, Jr., Day where the government not only gives the day off, but endorses Martin Luther King, Jr.'s philosophies and principles. *See* Ind.Code § 4-23-24.1-9. With Good Friday, Indiana simply gives its employees the day off. Because the *government itself* has not used its own activities and influence to advance religion, it has not established a religion by giving a holiday on Good Friday. *See Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence."). Therefore, the Good Friday holiday also satisfies *Lemon's* second prong.

CONCLUSION

Indiana has presented evidence of several secular purposes served by the Good Friday holiday, none of which have the principal effect of advancing religion. Thus, although it may be easier for some Christians to worship with the day off, that indirect effect does not violate the Establishment Clause. Therefore we hold that Section 1-1-9-1 of the Indiana Code is constitutional.

AFFIRMED.

FAIRCHILD, *Circuit Judge*, dissenting. With all respect, I conclude that the judgment appealed from should be reversed.

I have no quarrel with the proposition that the State of Indiana is free to designate a holiday in March or April in order to provide a holiday for its employees part-way through the four-month period between Martin Luther King, Jr. Day, in January, and Memorial Day, in May. Further, it is free to designate a Friday or Monday in order to extend a weekend to three days. Had it designated, for example, the first Friday in April, the fact that the day would be Good Friday in some years could hardly make the designation a violation of the Establishment Clause of the First Amendment. The real issue here is whether the State's choice of Good Friday as the spring holiday in every year is supportable under the *Lemon* test.

We should not lose sight of the fact that the judgment appealed from rests upon a grant of summary judgment, and not a trial. Review is *de novo*, without deference to conclusions reached by the magistrate judge, even where labeled a finding.

The first element of the *Lemon* test, is whether the selection of Good Friday as the spring holiday, beginning a three-day weekend, has a secular purpose. The state's decision to afford its employees a long weekend after Martin Luther King, Jr. Day and before Memorial Day is surely secular in nature, but the Establishment Clause question arises because the state has selected Good Friday, for many people a day of religious observance, the changing date of which is determined by purely religious tradition. The burden of presenting evidence of justification rests on the state. *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995).

In my view the evidence offered by the State would not support a finding that the purpose of selecting Good Friday, rather than a specific Friday or Monday in spring, was secular. The parties stipulated that there is no legislative history showing why Good Friday was made a legal holiday. I note, however, that the text of the statute characterizes Good Friday as "a movable feast day." Although "feast day" seems inappropriate to the events believed by Christians to have occurred on the first Good Friday, those who put these words in the statute in 1941 must have had in mind the religious character of Good Friday.

The parties also agreed that "The State has specified that the sole current secular purpose for the Good Friday holiday is that it provides a Spring holiday for State employees." The only testimony indicating why Good Friday could have been chosen was that of Mr. Beesley, the Governor's designee, as follows, "I think Good Friday works out well, because as I say, it's a natural travel time for a lot of us. But any day could have been picked for that purpose. And it does fall, as I said, I think, in the

response to interrogatories, happily about halfway between Martin Luther King's Birthday and Memorial Day."

There was evidence that "Nationwide, 35% of employers give the day off to their employees on Good Friday. (1997 Survey). In the East Central region [composed of Indiana and eight other states], that number climbs to 44%. . . . In the East Central region, 34% of government employers designate Good Friday as a holiday as do 52% of education employers. . . . [O]f the 293 school districts in the state, 89 closed on Good Friday." Based on this evidence, the magistrate judge concluded that "Good Friday is the logical choice for a spring holiday, because some state employees undoubtedly would seek to take that day off because their children and/or spouses have a school holiday or a day off work." There was also evidence that in the Indianapolis area, where most state employees presumably reside, "State and City-County offices, county courts and stock markets were closed on Good Friday [1997]. However, federal offices, most schools, stores and banks were open." With all respect, I do not think the equivocal Beesley testimony about travel time and the statistical evidence about school and business holidays in a nine-state region fulfilled the State's burden of proof that if there were no Good Friday holiday, demands by employees for leave on that day would create a significant problem for state government. *See Metzl*, 57 F.3d at 622. Indeed the State says: "evidence of business necessity was not offered as a reason for Indiana's holiday simply because that is not why Indiana has a Good Friday holiday." Brief of Appellee, p. 16. Moreover the record gives no reason to believe that

employees who desire to travel on the Easter weekend are not motivated by the religious significance of Easter to them.

The second element of the *Lemon* test is that the principal or primary effect of choosing Good Friday for the spring holiday neither advances nor inhibits religion. Almost by definition the choice of Good Friday advances the Christian religion (except, perhaps for those Christians who are adherents of the Eastern Church, whose tradition often puts Holy Friday on a different date). Those employees who do not observe Good Friday and who wish to take time off on a different day of religious observance must make a request and use a vacation, compensatory, or personal day or leave without pay. Thus their making that choice imposes a cost. There are circumstances under which the request may not be granted. The State's choice of Good Friday fails this element of the *Lemon* test as well. "[T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion unless there is a secular justification for the difference in treatment." *Metzl*, 57 F.3d at 621.

The majority relies on a suggestion in *Metzl* that

> Had Illinois made a forthright official announcement that the public schools shall be closed on the Friday before Easter in order to give students and teachers a three-day spring weekend, rather than to commemorate the crucifixion of Jesus Christ, we might have a different case.

Metzl, 57 F.3d at 623. "[M]ight have a different case" is scarcely a definitive ruling, and at best would be dictum.

In any event, there is no "forthright official announcement" by Indiana.

> Some holidays that are religious, even sectarian, in origin, such as Christmas and Thanksgiving, have so far lost their religious connotation in the eyes of the general public that government measures to promote them, as by making them holidays or even by having the government itself celebrate them, have only a trivial effect in promoting religion. Even Easter is becoming gradually secularized;. . . .

Metzl, 57 F.3d at 620. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984). The Supreme Court found a sufficient secular purpose in a state's choice of Sunday as a required day of rest. *McGowan v. Maryland*, 366 U.S. 420, 452 (1961). Good Friday, however, does not have the relevant attributes of Sundays, Christmas and Thanksgiving.

> It is a day of solemn religious observance, and nothing else, for believing Christians, and no one else. Unitarians, Jews, Muslims, Buddhists, atheists – there is nothing in Good Friday for them, as there is in the other holidays we have mentioned despite the Christian origins of those holidays.

Metzl, 57 F.3d at 620.

Even if, contrary to my view, the State's evidence could support a finding that the State had a secular purpose in maintaining the Good Friday holiday, and that it did not advance the Christian religion, the character of Good Friday itself and the affidavit of a professor of theology negating secularization of Good Friday are conflicting evidence which would pose a genuine issue of

fact, and the result should then have been to deny both cross motions for summary judgment, and proceed to trial.

With all respect, however, I conclude that the evidence is insufficient to establish a secular purpose, that the judgment should be reversed, the plaintiff's motion for summary judgment granted, and an injunction issued.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RUSSELL BRIDENBAUGH,	)	
Plaintiff,	)	
v.	)	
FRANK O'BANNON, in his official capacity as Governor of the State of Indiana,	)	**CAUSE NO. IP 97-1132-C (B/S)**
Defendant.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This cause is before the court on cross motions for summary judgment. The motions are fully briefed, and the court, being duly advised, **GRANTS** defendant's motion and **DENIES** plaintiff's motion for the reasons set forth below.

BACKGROUND

The facts in this case as stipulated by the parties are as follows:

1. In Indiana, Good Friday is a legal holiday. (Ind. Code 1-1-9-1).

2. The statute specifically provides that "the movable feast day" of Good Friday is a legal holiday.

3. Good Friday has been a legal holiday in the State of Indiana since 1941.

4. Good Friday is the Christian holiday which commemorates the death of Jesus Christ, believed by Christians to be the Messiah.

5. The date on which Good Friday is celebrated changes from year to year because it always falls on the Friday before Easter, and Easter falls on different dates from year to year. In 1998, Good Friday also happens to fall on the same date as the beginning of Passover.

6. As explained by Keith Beesley, the attorney for the State Personnel Department, if a date is a legal holiday, most state employees get the day off with pay.

7. This means that most Indiana offices are closed on legal holidays, although the employees are paid.

8. Certain Indiana offices, such as prisons, State Police offices, and State hospitals remain open all the time, and on legal holidays these offices go to a minimal staffing so that administrative staff are given the day off. Other employees, such as direct care staff, must report to work.

9. Those employees who have to work on legal holidays will either receive additional compensation or be given compensatory time off so that they may take the holiday off with pay on a different date.

10. Indiana statute provides that the date of the celebration of all legal holidays, with the exception of Dr. Martin Luther King's birthday, may be shifted to another date by the Governor.

11. The State's agreements with the labor organizations representing State employees reflect the State holidays specified in Ind. Code 1-9-1-1 and also reflect the fact that, with the exception of Dr. Martin Luther King's birthday, the dates of celebration of all state holidays can be changed by the Governor.

12. There is no legislative history specifying why Good Friday was made a legal holiday.

13. Good Friday is one of the holiest days in the Christian calendar in that it commemorates the death of Jesus.

14. For many Christians, Good Friday is a fast day and it is viewed as a very solemn day.

15. State employees who are not Christian and wish to take off a day of work that falls on one of their religious holidays must request the day off and use either vacation time, compensatory time, a personal day, or if they do not have such time, the leave would have to be without pay.

16. Although the State attempts to accommodate the requests of these employees to take time off for religious observances, there are times that it would be an undue hardship on the State to allow the person to have the day off and the day off will not be allowed. For example, if there is a shortage of correctional officers to work a particular shift or to deal with an emergency situation, an officer may not be permitted to take a particular day off.

17. The Indianapolis Star for Good Friday in 1997, March 28, 1997, discloses that State and City-County offices, county courts and stock markets were closed on Good Friday. However, federal offices, most schools, stores and banks were open.

18. The Indianapolis Star is reliable in its reporting as to what general categories of businesses and functions were open on Good Friday in the Indianapolis area.

19. The State has specified that the sole current secular purpose for the Good Friday holiday is that it provides a Spring holiday for State employees.

20. One of the benefits of employment with the State of Indiana is that the State provides a generous number of holidays for its employees. There are 14 State holidays a year in election years and 12 in non-election years since in election years both Primary Day and Election Day are legal holidays.

21. During election years, Indiana ranks in the top 3% of employers nationwide in the number of holidays provided. (1997 Survey of Employee Benefit Research Institute,[1]

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[1] The Employees Benefit Research Institute based in Washington, D.C., compiled this information based upon its survey of more than 4,000 employers nationwide. The information collected is also analyzed by region, with Indiana, Iowa, Illinois, Michigan, Minnesota, Missouri, Ohio, West Virginia and Wisconsin comprising the East Central region. The data is also analyzed in terms of whether employees are exempt, non-exempt plant workers or non-exempt office workers. The

hereinafter "1997 Survey") This is consistent with the State's philosophy that providing a generous number of vacation days benefits the employer because deviations from the normal work schedule bolster employee efficiency.

22. Good Friday falls during a period of time which could otherwise be without a holiday. In 1997, absent Good Friday, there would have been a period of over 4 months (18 weeks) without a holiday between Martin Luther King Jr.'s Birthday (observed January 20, 1997) and Memorial Day (observed May 26, 1997). Although both Lincoln's Birthday and Washington's Birthday fall on the calendar in the month of February, they are both generally moved by the Governor to periods of time later in the year so that State employees may have as a holiday the day after Thanksgiving and either the day before or after Christmas as a holiday. For example, in 1997, Lincoln's Birthday was celebrated on the day after Thanksgiving, which was November 28, 1997, and Washington's Birthday was celebrated on December 26, 1997. In 1998, Lincoln's Birthday will again be celebrated on

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classification of exempt or non-exempt refers to the Fair Labor Standards office workers. The classification of exempt or non-exempt refers to the Fair Labor Standards Act; exempt employees are those defined as administrative, executive and professional employees not covered by the overtime requirements of the FLSA; non-exempt employees are covered by FLSA overtime provisions. Unless otherwise noted, any reference to data from this survey will be based upon non-exempt office workers.

the day after Thanksgiving, November 27, 1998. Washington's Birthday will be celebrated on December 24, 1998.

23. Nationwide, 35% of employers give the day off to their employees on Good Friday. (1997 Survey). In the East Central region, that number climbs to 44%. Moreover, this number is not limited to private sector employers. In the East Central region, 34% of governmental employers designate Good Friday as a holiday as do 52% of education employers.

24. Records of the Indiana Department of Education indicate that in the 1996-97 school year, of the 293 public school districts in the state, 89 closed on Good Friday.

25. Aside from closing of State offices so as to give State employees a Spring holiday, the State is not aware of any other way that Good Friday has become a secular holiday, with the exception of knowledge of a case in Hawaii that referred to Easter related activity that took place on Good Friday and other commercial activity related to Easter.

26. Russell Bridenbaugh is an employed adult resident of Bloomington, Indiana who is a taxpayer in the State of Indiana.

27. Mr. Bridenbaugh believes that having Good Friday as a State holiday establishes a religious holiday as a State holiday and represents the State favoring one religion over other religions and over non-religion.

The parties also stipulated that:

> Good Friday is not one of the legal holidays that is moved by the Governor and it is observed as a State holiday on the day that it falls on the calendar.

The issue is whether the closing of State government in Indiana on Good Friday serves a secular purpose.

DISCUSSION

Bridenbaugh argues that Indiana Code 1-1-9-1 violates the First Amendment to the United States Constitution by making Good Friday, a Christian holiday, a legal holiday in the State of Indiana.[2] The establishment clause of the First Amendment forbids the government "to promote one religion at the expense of others (or even religion in general at the expense of non-belief)." *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995) (citations omitted). In other words,

> The First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice *their* religion, unless there is a secular justification for the difference in treatment.

Id. at 621 (emphasis in original). However, "a law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves

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[2] As an Indiana taxpayer, Bridenbaugh has standing to raise this constitutional challenge. *See Metzl v. Leininger*, 57 F.3d 618, 619 (7th Cir. 1995).

or because the effect in promoting religion is too attenuated to worry about." *Id.* at 620.

By closing the state government on Good Friday, Indiana undisputedly makes it easy for Christian state employees who wish to attend religious ceremonies on that day or otherwise observe what is a significant Christian religious holiday. By contrast, state employees of other faiths must ask permission to take off work for their religious holidays, must use a vacation day, compensatory time, or a personal day in order to be paid for the day, and may be denied permission to miss work if it would be a hardship to the State for them to be absent. Therefore, closing the state government on Good Friday does have the potential effect of making it easier for religious Christian state employees to practice their religion, although there is no evidence as to how many state employees actually use their day off for religious purposes. *See Metzl*, 57 F.3d at 621 (noting that the effect of closing Illinois public schools in promoting Christianity was "probably never very great").

In spite of this effect, the statute does not violate the establishment clause if there is a secular purpose for making Good Friday a state holiday. The State has the burden of proving that a secular justification for the statute exists. *Metzl*, 57 F.3d at 622. In *Metzl*, the Seventh Circuit examined at length what an acceptable secular purpose for closing public schools on Good Friday might be, and noted that one such purpose might be to provide students and teachers a long spring weekend, "Good Friday being chosen rather than a different Friday in the spring, or a Monday, because many students and teachers

would stay away from school anyway on Good Friday even if school were open." *Id.* at 622-23.

This is essentially the justification set forth by the State in this case – to provide a long weekend – a spring holiday – for its employees.[3] The State's philosophy is that providing its employees with a generous number of holidays bolsters employee efficiency. Indeed, Indiana's State employees receive a substantial number of paid holidays – 12 in non-election years and 14 in election years. The Good Friday holiday falls during a four-month period of time between Martin Luther King Jr.'s Birthday and Memorial Day during which there otherwise would not be a state holiday.[4] That said, however, the State must still prove that it has a secular justification for scheduling the "spring holiday" on Good Friday, a Christian holiday, rather than on another Friday or Monday during the spring.

The court, guided by the extensive dicta in *Metzl*, finds that the State has met its burden in this case. The undisputed facts reveal that approximately 30% of the

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[3] Bridenbaugh disputes that the "spring weekend" rationale is a legitimate one, and points out that the State did not advance this reason for the Good Friday holiday until after this case was filed. There is no evidence, however, that the State has advanced any other reason for the Good Friday holiday, nor is there evidence that the State has had the occasion to explain its reasoning for the holiday in the past.

[4] Two state holidays – Lincoln's Birthday and Washington's Birthday, fall in February; however, the Governor traditionally mandates that they be observed the day after Thanksgiving and the day before or after Christmas in order to accommodate State employees' holiday travel or other plans.

public school districts in Indiana were closed on Good Friday in the 1996-1997 school year. In addition, according to a survey cited by the parties, 44% of the employers in the East Central Region, which includes Indiana, designate Good Friday as a holiday for their employees. Therefore, it is logical for the State to choose that day as its spring holiday, as an accommodation to those state employees whose children are out of school and/or spouses are off work. *See Metzl*, 57 F.3d at 623 (noting in dicta, that "if fewer [students] would show up [for school on Good Friday] than on any other Friday or Monday in the spring, it would be the natural choice for elongating a spring weekend").

Bridenbaugh argues that the court must find that the Good Friday holiday violates the establishment clause because the State has failed to show that Good Friday, like Christmas, has become a "secularized" holiday in Indiana – a day to which Indiana residents, or at least state employees, have come to assign some secular traditions. *Compare Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (noting that Good Friday has become a popular shopping and recreational day in Hawaii) *with Metzl*, 57 F.3d at 622 (nothing that "Illinois is not Hawaii" and "[n]o one goes water skiing on Lake Michigan in mid-April"). If Hoosiers have widespread, non-religious, Good Friday traditions, they could constitute a valid secular purpose for the Good Friday holiday, just as it is a valid reason to close the state government for Christmas. However, such traditions, if they would be shown to exist, are not the only possible valid secular purpose for the holiday. Equally valid is the State's desire to boost its employees' efficiency by providing a long weekend in the

spring, and, as discussed above, Good Friday is the logical choice for a spring holiday, because some state employees undoubtedly would seek to take that day off because their children and/or spouses have a school holiday or a day off work.[5]

Accordingly, because the court finds that the State has advanced a valid, non-secular reason for the Good Friday holiday, the State's motion for summary judgment is **GRANTED** and Bridenbaugh's motion for summary judgment is **DENIED**.

ENTERED this 13 day of July, 1998.

/s/ V. Sue Shields
V. Sue Shields
United States Magistrate Judge
Southern District of Indiana

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[5] Of course, it would be more sensitive to the feelings of non-Christians to rename the state holiday to remove any reference to Good Friday, but the Constitution does not require this.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 19, 1999

Before

Hon. Thomas E. Fairchild, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

No. 98-3058

Russell Bridenbaugh,

Plaintiff-Appellant,

v.

Frank O'Bannon, in his official capacity as Governor of the State of Indiana,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 97 C 1132

V. Sue Shields, *Magistrate Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by Plaintiff-Appellant on August 9, 1999, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
FEB 4 2000
CLERK

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No. 99-812

In the Supreme Court of the United States

RUSSELL BRIDENBAUGH,
Petitioner,

v.

FRANK O'BANNON, Governor of Indiana,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

RESPONDENT'S OPPOSITION

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Question Presented

Indiana designates Good Friday as a holiday for State employees. The sole stated purpose for the holiday is to give employees a day off during a four-month Spring period that would otherwise be without a scheduled holiday. Because a large percentage of private employers and schools in Indiana also designate a Good Friday holiday, many State employees' families already are off on that day.

The question presented in this case is whether Indiana's Good Friday holiday violates the Establishment Clause.

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Statement of the Case

1. Since 1941, Indiana's statutes have set aside as a holiday for State employees, "Good Friday, a movable feast day." Ind. Code § 1-1-9-1(a); App. 21a. No legislative history illuminates why legislators enacted the holiday at that time. App. 23a.

The effect of this holiday is to give most State employees the day off with pay. App. 22a. Most Indiana State offices are closed on Good Friday. *Id.* Those

employees who have to work on legal holidays -- such as prison, State Police, and state hospital employees -- receive either additional monetary compensation or compensatory time off in exchange for working on the holiday. *Id.*

Although Good Friday is a solemn and holy day for Christians, Indiana does not celebrate the religious aspects of Good Friday. App. 23a, 14a. There are no State-sponsored public commemorations of the day. *Id.* Aside from closing State offices to give State employees a Spring holiday, the State stipulated that it was unaware of any other way in which Good Friday itself has become a secular holiday in Indiana, although Good Friday part of Easter weekend, which has significant commercial activity and other secular aspects. App. 26a.

The parties to this case stipulated that the State's sole specified purpose for the Good Friday holiday is to provide a Spring holiday for State employees. App. 24a. Indiana is generous in providing holidays to its employees, with 14 State holidays in election years and 12 in non-election years. *Id.* In election years, Indiana ranks in the top 3% of employers nationwide in the number of holidays provided to employees. *Id.* Indiana's employment philosophy is that a generous number of vacation days benefits the State as an employer because deviations from the normal work schedule bolster employee efficiency. App. 25a.

Good Friday falls during a long period of the year that would otherwise be without a holiday for Indiana employees. App. 25a. Without the Good Friday holiday or another comparable Spring holiday, a period of more than four months would elapse without a holiday, from Martin Luther King, Jr.'s birthday in mid-January to Memorial Day at the

end of May.[1] *Id.* This long period without a holiday occurs because Indiana's practice is to move the holidays for Lincoln's Birthday and Washington's Birthday to the day after Thanksgiving and a day adjacent to Christmas to lengthen the periods of those holidays. *Id.* For example, in 1997 Lincoln's Birthday was celebrated November 28, and Washington's Birthday was celebrated December 26. *Id.*

Indiana is not alone in designating Good Friday as a holiday. Nationally, 35% of employers give the day off to their employees, and 44% do so in the East Central region, where Indiana is located. App. 26a. In the East Central region, 34% of governmental employees designate a Good Friday holiday, as do 52% of educational employers. *Id.*

2. This action was brought in the United States District Court for the Southern District of Indiana by Russell Bridenbaugh, a taxpayer in the State of Indiana. He challenged Indiana's Good Friday holiday as a violation of the Establishment Clause.

The case was presented to the district court on stipulated facts and both parties' motions for summary judgment. It ruled that Indiana met its burden of proving a secular purpose for its Good Friday holiday, "to provide a long weekend -- a spring holiday -- for its employees." App. 29a. Indiana could legitimately choose Good Friday, a religious holiday, for its Spring holiday "as an accommodation to those state employees whose children are out of school and/or spouses are off work" because many schools and private employers are closed on the same day.

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[1] In election years, the primary election day holiday occurs on the first Tuesday after the first Monday in May. In election years, the time period without a holiday would be just short of four months.

App. 30a. The district court therefore granted summary judgment in favor of Indiana.

3. The Seventh Circuit affirmed the district court with one judge dissenting. The panel majority applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), requiring examination of whether (1) the law has a secular purpose; (2) the principal effect of the law advances or inhibits religion; and (3) the law fosters excessive entanglement with religion. App. 4a.

The majority ruled that Indiana's stated justification for the Good Friday holiday -- to provide a Spring holiday for employees during a period with no other break from the regular work schedule -- is a legitimate secular purpose. App. 7a-8a. The majority noted that Good Friday was a logical choice for the holiday because a large number of schools and private employers are closed on the same day. *Id.*

The majority declined Bridenbaugh's invitation to rule that Good Friday could never be secularly justified as a holiday because of its inherent religious character. App. 9a. It also ruled that Bridenbaugh had failed to show that Indiana's stated purpose for the holiday was a sham. App. 12a.

The majority also rejected Bridenbaugh's argument that the Good Friday holiday impermissibly advances religion. App. 13a-14a. The majority reasoned that although the Good Friday holiday facilitates the religious observance of practicing Christians, that result is too indirect and remote to constitute advancement of religion under *Lemon*. *Id.* The majority found this conclusion bolstered by the fact that

Indiana as a State takes no action to endorse or celebrate Good Friday. App. 14a.

Senior Circuit Judge Fairchild dissented. He concluded that the State's evidence that many people travel over Easter weekend and that many schools and businesses also are closed on Good Friday did not sufficiently support Indiana's choice of Good Friday, as opposed to a Spring day without religious significance, as Indiana's Spring holiday. App. 17a. He also concluded that Indiana's Good Friday holiday impermissibly advances religion by making it easier for Christian State employees to celebrate their holiday than for adherents of other religions, whose religious holidays are not State holidays. App. 18a.

Reasons for Denying the Writ

I. There is no circuit conflict.

The circuits agree on the proper test to determine the legality of a Good Friday holiday. All of the circuits require (1) a "valid secular justification" for the holiday, (2) that the holiday does not have "the principal effect of advancing religion," and (3) that it not foster excessive entanglement between church and state. *Bridenbaugh v. O'Bannon*, App. 4a, 5a, 12a-13a.

Thus, the circuits all uniformly apply the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), in Good Friday cases. *Bridenbaugh*, App. 4a; *Granzeier v. Middleton*, 173 F.3d 568, 572 (6th Cir. 1999); *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999), *cert. denied*, 68 USLW 3337 (1/18/00); *Cammack v. Waihee*, 932 F.2d 765, 773 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). The district court opinion cited in Bridenbaugh's petition also

applied *Lemon*. *Franks v. Niles*, 1982 WL 460, 29 Fair Emp. Prac. Cas. (BNA) 1114 (N.D. Ohio 1982).

In these cases, the circuits approved Good Friday holidays in Indiana, Kentucky, Maryland, Hawaii, and Ohio, respectively. In each case, the court found a valid secular justification for setting aside Good Friday as a State holiday. As in this case, other circuits determined it was appropriately secular for governmental entities to give employees a Spring holiday. *Granzeier*, 173 F.3d at 574; *Koenick*, 190 F.3d at 266; *Cammack*, 932 F.2d at 776. The courts of appeals determined that Good Friday was an appropriate holiday because it was a common day for families to travel and it coincided with time off given by schools and other employers. *Granzeier*, 173 F.3d at 574; *Koenick*, 190 F.3d at 266. As in this case, other circuits determined that the benefit to Christian believers who could attend religious services without taking time off was incidental to the holiday's primary secular purpose.

The cases invalidating Good Friday holidays also applied *Lemon*, but they reached a differing result on different facts. The Seventh Circuit's opinion invalidating Illinois' Good Friday statute, *Metzl v. Leininger*, 57 F.3d 618, 620 (7th Cir. 1995), did not get past the first of *Lemon*'s three prongs. The Seventh Circuit found that Illinois had failed to show any secular justification for its statute requiring schools to close on Good Friday. *Id.* Illinois failed to prove that absentee rates would be high on Good Friday or that there was any other reason it would be difficult to keep schools open on Good Friday, nor did it advance any other secular justification. *Id.* at 622-23. In his opinion, Chief Judge Posner expressly stated that Illinois might be able to validly re-enact the Good Friday school holiday if it expressed a

secular justification, such as creation of a Spring holiday. *Id.* at 623-24.

Following *Lemon* as construed by *Metzl*, a district court in Wisconsin invalidated a four-hour Good Friday holiday because it lacked secular purpose. *Freedom from Religion Foundation v. Thompson*, 920 F. Supp. 969 (W.D. Wis. 1996). Indeed, the invalidated Wisconsin statute explicitly stated that the purpose of the holiday was to permit religious observance, 920 F. Supp. at 922 (citing Wisc. Stat. § 895.20), negating any secular purpose.

Similarly, in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal.Rptr. 244 (1976), the California Court of Appeals applied *Lemon* to invalidate a three-hour Good Friday holiday because California failed to show a secular purpose and the hours of the holiday coincided with the most common times for Good Friday religious services. 54 Cal. App. 3d at 612-13; 127 Cal.Rptr. at 254-55. The Connecticut Supreme Court applied the same test (attributing it to *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)) to invalidate a prohibition on Good Friday liquor sales, also finding no secular purpose. *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16 (1981).

The cases show neither doctrinal disparity nor a split among the circuits.[2] Although Bridenbaugh suggests that

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[2] Two other cases approve Good Friday holidays that were created through collective bargaining. *California School Employees Ass'n v. Sequoia Union High School Dist.*, 67 Cal. App. 3d 157, 136 Cal.Rptr. 594 (1977); *Americans United for Church & State v. Kent County*, 293 N.W.2d 723 (Mich. App. 1980). These cases emphasized that choice of days off lay largely with employees' representatives and that there were practical, secular reasons for employees to select Good Friday as part of a package of public employee holidays. *California School Employees*, 67

there is "conflict and confusion" among the lower courts on the issue of Good Friday holidays, he has demonstrated none. Rather, the cases show that all the lower courts have applied the *Lemon* standard, as did the Seventh Circuit in this case, and that disparities in results arise only from different factual circumstances. This uniformity does not justify granting the writ.

II. The Seventh Circuit followed precedent.

The Seventh Circuit's decision represents no departure from the Court's Establishment Clause jurisprudence. In fact, on close examination, Bridenbaugh's complaint is not that the Seventh Circuit misinterpreted or corrupted doctrine, but only that the Seventh Circuit misapplied the law to the facts of this case. Moreover, Bridenbaugh's recitation of the facts is wrong.

Only the second prong of the *Lemon* test -- the prong that implicates endorsement -- is at issue in this case. Indiana has articulated a secular purpose for its holiday -- giving employees a Spring holiday during a period with no other holiday, on a day when many private employers and schools also give time off. App. 8a. Indiana thus has met the first *Lemon* prong. Also, there is no dispute in this case that Indiana's Good Friday holiday causes no entanglement between church and state, so the third *Lemon* prong is satisfied.

Bridenbaugh's complaint is that the Good Friday holiday impermissibly advances religion under the second prong of *Lemon* or, put another way, that it impermissibly endorses religion under what has been referred to as the

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Cal. App. 3d at 160-61, 136 Cal.Rptr. at 595-96 (citing *Lemon*); *Americans United*, 293 N.W.2d at 726.

endorsement test. *See Lynch v. Donnelly*, 465 U.S. 668, 699 (1984) (O'Connor, J., concurring) (articulating endorsement test); *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 763 (1995) (same). *See also Granzeier*, 173 F.3d at 573 (explaining Sixth Circuit's treatment of endorsement test as elaboration of second prong of *Lemon*).

But Bridenbaugh's point is not that the Seventh Circuit got the doctrine wrong or that the doctrine is unsettled (although he advertises "doctrinal confusion" in his petition, Pet. at 9). Rather, Bridenbaugh simply disagrees with the Seventh Circuit's application of the law to the facts in this case. Specifically, Bridenbaugh argues that the Seventh Circuit approved Indiana's holiday "without requiring Indiana to demonstrate any secular reason why it selected Good Friday over [other] available dates." Pet. 11. Because most businesses and schools in Indiana are open on Good Friday, Bridenbaugh says "Indiana never explained why it chose to set Good Friday as a state holiday when it is not recognized as such by the remainder of the state." *Id.*

Bridenbaugh is simply wrong about the facts in this case, because Indiana provided the explanation he claims to be lacking. Although most schools and businesses in Indiana are open on Good Friday, a large percentage of them are not. App. 26a. In Indiana's region, 44% of employers and 34% of governmental employers observe a Good Friday holiday, and so do 52% of educational employers.[3] Among all Spring days, therefore, it is appropriate for Indiana to choose Good Friday as a holiday because many state employees' spouses and children have the day off already, as the Seventh Circuit held. App. 8a ("it is logical for the State to choose that day

[3] The figure for educational employers apparently includes higher education. In 1997, 89 of Indiana's 293 public school districts observed a Good Friday holiday. App. 26a.

as its spring holiday, as an accommodation to those state employees whose children are out of school and/or spouses are off work"(quoting district court opinion)).

As the Seventh Circuit properly found, Indiana's designation of a Good Friday holiday is neither advancement of religion under *Lemon* nor endorsement for at least two reasons. First, Indiana's selection of Good Friday is recognition that it is a day that many private, public, and educational employers already provide as a day off. It represents recognition that many state employees would seek the day off to spend time with their families. App. 8a.

Second, no endorsement of religion can be implied because Indiana does not otherwise celebrate or recognize Good Friday. App. 11a; *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (plurality) (state recognition of religious holidays is not endorsement if state does not focus on religious message). Indiana holds no celebrations or commemorations that could be taken to imply endorsement. App. 14a. On these bases, the Seventh Circuit properly concluded that "the State has established several legitimate secular justifications for the Good Friday holiday, and has presented evidence supporting those justifications"; it also properly concluded that any advancement of religion was too remote to have constitutional significance. App. 13a-14a.

Bridenbaugh has failed to show that this case raises any issue beyond whether the lower courts properly applied *Lemon* to the facts of this case. Nothing in the Seventh Circuit's approach to Establishment Clause jurisprudence justifies granting the writ.

Conclusion

This Court should deny the petition for writ of certiorari.

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